petent since the respondent who was sued in respect of a contract entered into by her as the administratrix was not shown either in the writ or the indorsement thereto or in the statement of claim to have been sued in her representative capacity. Though no objection was taken at any stage prior to the cross-appeal, it was however contended that it was not too late to object on this ground. But it was also argued on behalf of the respondent that it was too late for the appellant to object to the evidence of the separate oral agreement for damages at the hearing of the appeal. We have considered the appeal on the basis that this oral agreement was an issue and on the basis, but without deciding, that it was adducible and admissible in evidence and we have discussed the effect of it. We propose to give further consideration to the respondent's point.

We agree that under Order 3 rule 4 Rules of the Supreme Court the representative capacity of the respondent should have been shown in the endorsement on the writ. No case has however been cited to us and we ourselves are unable to find any to support the proposition that the omission made the action incompetent. Neither did Mr. Lim for the respondent contend that the writ was a nullity. If so, the defect is curable under Order 70 rule 1, and having regard to the stage in the proceedings, we would give leave to amend to cure any irregularity there might be.

The appeal is allowed and the cross-appeal is dismissed both with costs. There will be an order that the respondent as administratrix specifically perform the agreement to sell by executing proper and valid transfers of the lands in question upon payment of the full purchase money and a further order that if she defaults, the Senior Assistant Registrar be empowered to execute the relevant documents on her behalf. The 2nd appellant should be struck out from the action and we so order. He will however not be entitled to any costs.

Appeal allowed; Cross-appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Subbiah & Co.*

ABDUL RAHMAN v. SOON AH HAI

[F.C. (Ong Hock Sim, Raja Azlan Shah & Chang Min Tat F.JJ.) December 8, 1977 and February 23, 1978]

[Penang — Federal Court Civil Appeal No. 117 of 1977]

Road Traffic — Collision between motorcycle and motor car — Inferences made by trial judge not supported by evidence — Both parties, to blame.

This was an appeal from the decision of the High Court relating to an accident which took place between a motor car driven by the appellant and a motorcycle driven by the respondent. It appeared from the facts that the accident occurred when the respondent was overtaking a lorry. The respondent said that at that time the appellant's car came at great speed and encroached on his side of the road. The appellant on the other hand said the respondent had suddenly emerged from behind a lorry in an attempt to overtake it and the appellant was unable to take evasive action. The learned trial judge found that the collision took place on the respondent's side of the road and that the appellant was wholly to blame.

Held, allowing the appeal: in the light of the evidence it was inconceivable how there could be acceptance of the respondent's version of the accident. The sketch plan showed the impact to be very near the centre of the road. In the circumstances the appellant and the respondent were equally to be blamed and the liability of the appellant should be 50%.

FEDERAL COURT.

S. Thillaimuthu (*Charles Ong* with him) for the appellant.

Triptipal Singh for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): This appeal concerned an accident occurring at about 7.45 a.m. on December 2, 1974 when motor-car No. PJ 1501 driven by the appellant along Glugor Road in the direction of Jelutong collided with a motor-cycle No. PJ 8067 ridden by the respondent and carrying a pillion towards Bayan Lepas, i.e. in the opposite direction.

The respondent told the court that he was 3-4 feet from his left edge of the road travelling behind a lorry at about 25 m.p.h. when the appellant's car came at a great speed and encroached on his side of the road and collided with him.

The appellant said that the collision occurred as a result of the respondent suddenly emerging from behind a lorry in an attempt to overtake it and that he was unable to take evasive action. He claimed that the impact was in the middle of the road.

With two divergent versions before him the learned judge found that "although the plaintiff was more than 3-4 feet from his left edge of the road, he was still on his side . . . when the collision took place." He agreed that "it was probable that the motor-cyclist was trying to overtake the lorry when the defendant's car encroached on to his side of the road." He went on "whilst it was probable that the defendant's car was more on his side of the road when he passed the lorry, it was also probable that after passing the lorry, the defendant's car began to move obliquely on to the wrong side of the road." From the scratch-mark, the final position of the motor-cycle, the blood-stains on the road, he concluded that the collision took place on the respondent's side and the sole cause of the accident was therefore the behaviour of the appellant in encroaching on the wrong side into the path of the motor-cycle "as it was trying to overtake but before it overtook the lorry."

Counsel for the appellant submitted before us that these findings by the learned judge were based on inferences not in evidence. It was only in cross-examination that he admitted that there was a lorry in front. He asserted that "I was not trying to overtake the lorry in front." As he said earlier "I was travelling at about 25 m.p.h. The lorry was travelling faster.... I was travelling slowly because I was climbing a slope." His pillion rider said that the motor-cycle was 3 feet from left edge, following behind it more than 50 feet away. In the light of this evidence, it is inconceivable how there could be acceptance of the respondent's version of the accident. The physical evidence from the sketch-plan showed the impact to be very near the centre of the road. The lorry would have acted as a shield for the respondent

if the appellant started to encroach on his side of the road if he was no more than 3-4 feet from the edge of the road which was only 18 feet 8 inches wide. We are of the view that the respondent did attempt to overtake. He had first seen the car coming from the opposite direction about 150 feet away (His pillion first saw the car in front 100 feet away) and there was no other vehicle in front. He nevertheless tried to overtake and a little too late he appreciated he could not quite make it. The appellant had not anticipated that the respondent would persist in his attempt to overtake and could not take evasive action. He could perhaps have braked or slowed down a little, in the event the respondent was fool-hardy enough to continue.

We therefore disagreed, with respect, with the learned judge in holding the appellant wholly to blame and that the respondent was not guilty of contributory negligence as he was only trying to overtake a lorry but had not in fact at the time of collision overtaken the lorry yet and was still on his side of the road. He would then have been likely thrown on to the lorry. He must certainly have been very near the centre, if not on the other side.

We found in the circumstances that the respondent and the appellant were equally to be blamed. We therefore varied the judgment of the High Court to one of 50-50 per cent liability. As ground 7 was abandoned at the outset, we ordered that half the sum awarded be paid to the respondent. We made no order as to costs of this appeal. The deposit was to be refunded to the appellant.

Appeal allowed.

Solicitors: *Jayaraman, Ong & Co.; Triptipal Singh & Co.*

GOVERNMENT OF MALAYSIA v. SIM SIOK ENG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 9 and March 3, 1978]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 69 and 73 of 1976]

Practice and Procedure — Appeal to Yang di-Pertuan Agong — Leave granted subject to conditions — Application for extension of time to prepare record of appeal and to pay deposit for costs — No reasons given for delay in paying deposit — Whether Government bound — Federal Court (Appeals from the Federal Court) (Transitional) Rules, 1963, r. 7 — Government Proceedings Ordinance, 1956, ss. 18 and 30.

The appellant had been granted leave to appeal to the Yang di-Pertuan Agong subject to the two usual conditions: (i) that a deposit for costs be paid within three months and (ii) that the appellant prepare the record of appeal within three months. Appellant applied for time to be enlarged for them to comply with the two conditions. The deposit was paid 17 days late. It was argued that the provisions of Rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules do not apply to the Government.

Held: (1) to justify an extension of time there must be material upon which the court could exercise its discretion, for otherwise a party in breach could have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation;

(2) in this case the condition in respect of deposit had not been complied with within the stipulated time and as the statutory condition had not been fulfilled the court had no power to grant an extension of time;

(3) the Government as a party was not exempted from Rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules.

Cases referred to:-

(1) *Ohene Moore* v. *Akesseh Tayee* [1935] A.C. 72.

(2) *Chong Thian Yin & Ors.* v. *The Trustees of the Estate of Cheang Kok Sang & Anor.* [1954] M.L.J. 37.

(3) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153.

(4) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

(5) *Kerridge* v. *Lamdin* [1950] 1 K.B. 478, 484.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for the appellant.

V.K. Palasuntharam for the respondent.

Wan Suleiman F.J.: The judgment of the court which I am about to read has been written by the Chief Justice, Borneo.

Lee Hun Hoe C.J. (Borneo) (read by Wan Suleiman F.J.): On September 5, 1977 appellant was granted conditional leave to appeal to His Majesty the Yang di-Pertuan Agong against the order of this court dated July 14, 1977 on the two usual conditions: —

(1) That appellant do within three months enter into good and sufficient security in the sum of $5,000 for the due prosecution of the appeal and the payment of all such costs as may become payable;

(2) That appellant do within the period of three months procure the preparation of the record of appeal.

By a motion dated December 10, 1977, appellant applied for an order that the time for complying with the two above conditions be enlarged for a further two months from December 5, 1977. An affidavit was filed in support of the application. Paragraph 3 of the affidavit sets out the reason for the application and reads: —

"The record of appeal involves several bulky exhibits which have to be sorted out and photostated. It will take time to prepare the record of appeal which will be very voluminous. In view of the foregoing, the time of three months granted by this Honourable Court is inadequate to complete the preparation of the record of appeal."

Respondent took objection to the application on the ground that the deposit was paid on December 22, 1977, i.e. 17 days late. Appellant conceded the late payment. But no reason was given in the affidavit for this late payment.

Rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules 1963 states: —

"7. Leave to appeal to the Yang di-Pertuan Agong in a civil matter shall only be granted by the court in the first instance —

(a) upon condition of the appellant, within a period to be fixed by the court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the court, in a sum not exceeding $5,000 for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the respon-